FILE COPY

JAN 31 1930

Supreme Court of the United States.

OCTOBER TERM, 1929.

Nos. 5, 32, 56 and 123.

JOHN JOHNSON, Petitioner,

5 *against*

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, Sued in the Name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC., Petitioners,

32 *against*

BENJAMIN LUSTGARTEN, an Infant, by His Guardian, *ad Litem*, JOHN A. LYDECKER,

FEDERAL SUGAR COMPANY, LTD., *et al.*, Petitioners,

56 *against*

THE UNITED STATES OF AMERICA.

ROYAL INSURANCE COMPANY, LTD., *et al.*, Petitioners,

123 *against*

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR A REHEARING OF JOHN JOHNSON, PETITIONER, AND BENJAMIN LUSTGARTEN, RESPONDENT, AND OF SEVEN ATTORNEYS AS *AMICI CURIÆ*.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

SUBJECT INDEX.

	PAGE
Concerning the importance of the decisions in these cases	2
Schedule A	5
Schedule B	7
Concerning the points which the court has overlooked or misapprehended	11
Congress did not intend that the remedy granted by the Suits in Admiralty Act should be exclusive of suits at law by seamen against the Fleet Corporation	11
The Jones Act	12
The Suits in Admiralty Act	15
The Rosenberg case	18
Concerning the constitutionality of the Suits in Admiralty Act if it be construed as excluding the right of seamen to maintain action at law against the Fleet Corporation	23
Unconstitutionality under the Fifth Amendment	23
Unconstitutionality under the Seventh Amendment	24
Jurisdiction assumed by lower common law courts, should not now be ousted by an exclusive construction	25
Error in Johnson decision	26

TABLE OF CASES CITED.

	PAGE
Blamberg *v.* United States, 260 U. S. 452 (1923)	17
Bonham *v.* Southern Menhaden Corp., 284 F. 362 (D. C., S. D. Fla.), 362 (1922)	24
Chelentis *v.* Luckenbach, 247 U. S. 372 (1917)	19, 24
Eastern Transportation Co. *v.* United States, 272 U. S. 675 (1926)	18
Fleet Corporation *v.* O'Shea, 5 F. (2d) 123 (1925)	3
Fleet Corporation *v.* Rosenberg, 276 U. S. 202 (1928)	3, 11, 18
Fleet Corporation *v.* Texas Star Flour Mills, 12 F. (2d) 9, 12 (1926)	17
Geddes *v.* Anaconda Mining Co., 254 U. S. 590, 593 (1921)	26
Green *v.* Biddle, 8 Wheat. 1, 17 (1823)	4
Greenwald *v.* Fleet Corporation, 16 F. (2d) 948 (1927)	3
Minnesota *v.* Hitchcock, 185 U. S. 373, 385 (1901)	20
New Jersey Steam Navigation Co. *v.* Merchants Bank, 6 How. 344 (1848)	25
Panama Railroad *v.* Johnson, 264 U. S. 375, 388 (1923)	19, 21, 25
Philadelphia R. R. Co. *v.* Berg, 274 F. (C. C. A., 3) 574 (1921)	24
Shewan & Son *v.* United States, 266 U. S. 108 (1924)	17
Sloan Shipyards *v.* Fleet Corporation, 258 U. S. 549, 568 (1923)	19, 20, 23
The Hamilton, 207 U. S. 398, 404 (1907)	24
United States *v.* C. A. Lindgren as Administrator, No. 25, October Term 1929, argued October 8, 1929, in U. S. Supreme Court	15
United States *v.* C. A. Lindgren as Administrator, 28 F. (2d) 725 (1928)	15

PAGE

Wallace *v.* Fleet Corporation, 5 F. (2d) 234, 236 (1925) 17

Wright *v.* the Fleet Corporation, 285 Fed. 647 (1922) 3, 17

TABLE OF MISCELLANEOUS AUTHORITY.

Constitution—Fifth Amendment 23

Constitution, Article III, Section 2..... 25

Constitution—Seventh Amendment 24

Eighth Annual Report of Secretary of Commerce, October 30, 1920, p. 171..... 13

Jones Act, Section 33 (U. S. Code, Tit. 46, Sec. 688). 12

Jones Act, Sections 1, 5, 7, 12, 14, 18..... 14

Judiciary Act, 1789..... 24

Remarks of Senator Jones, Congressional Record, Vol. 58, Part 7, 66th Congress, 1st Session, p. 7138 16

Report of Senate Committee on Commerce, No. 223, 66th Congress, 1st Session..... 16

Story's Commentaries on the Constitution, 4th Ed., Sec. 1672, Note 4..... 24

Suits in Admiralty Act (U. S. Code, Tit. 46, Sec. 742) 15, 16

Supreme Court of the United States.

Nos. 5, 32, 56 and 123. October Term, 1929.

John Johnson, Petitioner,

5 vs.

United States Shipping Board Emergency Fleet Corporation,

United States Shipping Board Merchant Fleet Corporation, Sued in the Name of the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, Inc., Petitioners,

32 vs.

Benjamin Lustgarten, an infant, by his Guardian, *ad Litem*, John A. Lydecker,

Federal Sugar Company, Ltd., *et al.*, Petitioners,

56 vs.

The United States of America.

Royal Insurance Company, Ltd., *et al*, Petitioners,

123 vs.

United States Shipping Board Merchant Fleet Corporation.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR A REHEARING

OF

John Johnson, Petitioner, and Benjamin Lustgarten, Respondent, and

Silas B. Axtell, as *amicus curiæ* on behalf of Henry Schaeffer and Michael D'Arcy;

Raymond F. Parmer, as *amicus curiæ* on behalf of Michael Shea;

Paul Matthews, as *amicus curiæ* on behalf of Walter J. Masjulis;

JOHN WINANS, as *amicus curiæ* on behalf of Barry R. Lundy;
FREDERICK R. GRAVES, as *amicus curiæ* on behalf of Manuel L. Ochoa;
SAMUEL N. BROOK, as *amicus curiæ* on behalf of Alfred Adders;
EDGAR J. TRACY, as *amicus curiæ* on behalf of Jesse Christman and Rosa Blum.

Come now the above named petitioners and present this their petition for a rehearing of the above entitled causes, and in support thereof respectfully show:

Concerning the Importance of the Decision in these Causes.

Your petitioners, Johnson and Lustgarten, and those on whose behalf the petition is presented by counsel appearing as *amici curiæ*, all received injuries in connection with the operation of ships under the control and management of the Fleet Corporation, with the exception of those claiming under a decedent who suffered injuries resulting in death. Many of the injuries suffered were serious and a permanent character and one resulted in death. The nature of each such injuries is specified in the schedule annexed marked "A". That such injuries were caused through negligence attributable to the Fleet Corporation has been adjudged. In each case a judgment has been recovered in an action brought against the Fleet Corporation, the date and amount of which is also set forth in Schedule A. More than two years have elapsed since the respective injuries were suffered, and no libel in admiralty has been filed on their behalf to recover for such injuries. If the judgments recovered are reversed because redress was sought in actions at law, those injured are without remedy.

In 1922 before these suits were brought, it had been determined that the Suits in Admiralty Act did not provide an exclusive remedy, and it appears that for a long time subsequently, the government did not seriously contend that that statute barred suits at law by injured seamen.

In *Wright* vs. *the Fleet Corporation,* 285 Fed. 647, (1922), the argument was advanced as to the exclusiveness of the Suits in Admiralty Act, but the defense based thereon was dismissed by Hon. Augustus N. Hand, now Circuit Judge.

In 1925, the case of *Fleet Corporation* vs. *O'Shea,* 5 F. (2d) 123, was affirmed in the United States Circuit Court of Appeals, District of Columbia. There a boatswain had been injured through the negligence of the mate in compelling him improvidently to work in a dangerous place. No petition for a writ of certiorari was presented by the government's attorneys, although the cause of action was handled in its Washington office.

Two years later, the Circuit Court of Appeals in the Second Circuit in the case of *Greenwald* vs. *Fleet Corporation,* 16 F. (2d) 948 (1927), held that a cause of action for death arising through the furnishing of improper food, and neglect on the part of the master to give proper treatment afterwards to a sick seaman, presented a cause of action under the Jones Act, and the judgment in full, in the substantial sum of $10,000. was paid by the Fleet Corporation, without any effort to have the matter reviewed by this Court.

It thus appears that from 1922 until 1928, the date of the decision in *Fleet Corporation* vs. *Rosenberg,* 276 U. S. 202, there was not the slightest intimation on the part of any court, nor was it seriously urged by the Fleet Corporation, that the exclusive remedy of seamen for injuries suffered, was to proceed under the terms of the Suits in Admiralty Act.

Not only are those in whose behalf this petition is presented affected by the determination of the court in the above entitled causes, but many other claimants who, relying upon the earlier decisions, brought suits at law against the Fleet Corporation. Annexed is a schedule marked "B" of such of the suits so brought, which have come to the attention of your petitioners.

That such facts may appropriately be considered by the court on such an application is indicated by the case of *Green* vs. *Biddle*, 8 Wheat. 1, 17 (1823), where it appears that Mr. Henry Clay, as *amicus curiæ*, moved for a rehearing in the cause upon the ground that it involved the rights and claims of numerous occupants of land in Kentucky, stating that the rights and interests of those claimants would be irrevocably determined by the decision of the court. The motion so made was granted.

We respectfully submit that unless there is some compelling reason, this court should not now, nearly ten years after the passage of the Suits in Admiralty Act and the Jones Act, place a construction thereon completely at variance with the construction which was adopted by the lower courts at an early date after the passage of these acts, and which has been relied upon by countless suitors who will now be rendered remediless if the former construction is overruled.

Schedule A.

This is a list of those seamen who claim a right of action against the Fleet Corporation and/or operator at common law with right of trial by jury and whose claims have been reduced to judgments and who have not filed libels. More than two years have expired since the accrual of their causes of action. The schedule contains in the order indicated the following items of information: Name of plaintiff and defendant; attorney and address; the court where judgment obtained; amount of judgment; date of judgment; character of the negligence; nature of the injury.

.....

Henry Schaeffer *v.* Fleet Corporation; Mr. Silas B. Axtell of 11 Moore Street, New York, N. Y.; Supreme Court for County of Kings; $8,185.60; 12/3/28; failure to provide plaintiff with proper equipment to hoist pontoon from water; fracture of vertebrae, permanent injury.

Michael D'Arcy *v.* Fleet Corporation; Mr. Silas B. Axtell; Supreme Court for County of New York; $15,177.25; 1/5/29; failure to provide proper gangplank; fracture of vertebrae, permanent injury.

Benjamin Lustgarten *v.* Fleet Corporation; Mr. Silas B. Axtell; District Court for Southern District of New York; $10,226.50; 7/22/27; failure to treat, brutal treatment; incipient tuberculosis.

Manuel Ochoa *v.* Fleet Corporation and Black Diamond SS. Corp.; Mr. Frederick R. Graves of 11 Broadway, New York, N. Y.; Supreme Court for County of Richmond; $9,359.55; 6/13/29; unguarded opening between decks; fractured spine.

Walter J. Masjulis *v.* Fleet Corporation and Consolidated Nav. Co.; Mr. Paul Matthews of 29 Broadway, New York, N. Y.; District Court for Southern District of New York; $30,117.40; 12/13/29; caused to drop to deck, defective boatswain's chair; fractured skull and internal injuries.

Michael Shea *v.* Fleet Corporation and Export SS. Corporation; Mr. Raymond F. Parmer of 27 William Street,

New York, N. Y.; Supreme Court for County of Richmond; $3,399.90; 4/21/28; failure to treat; chronic anœbic dysentery.

Barry R. Lundy *v.* Fleet Corporation and United Gulf SS Company; Mr. John Winans of 50 Church Street, New York, N. Y.; District Court for Eastern District of New York; $17,641.50; 12/16/29; negligent swinging of gangplank on deck; total loss of hearing in one ear, partial loss of hearing in the other.

Alfred Adders *v.* Fleet Corporation and Moore & McCormack Co.; Mr. Samuel N. Brook of 261 Broadway, New York, N. Y.; District Court for Southern District of New York; $6,557.85; 2/28/29.

Jesse Christman as adm. of Estate of Ed. Weldon; Christman *v.* Fleet Corporation and Tampa Interocean SS. Co.; Mr. Edgar J. Tracy of 15 Park Row, New York, N. Y.; Supreme Court for County of Kings; $3,696.50; 12/13/28; Washed overboard through improvident order; death.

Rosa Blum *v.* Fleet Corporation and United American Lines, Inc.; Mr. Edgar J. Tracy; District Court for Eastern District of New York; Verdict of $5,000; Feb./29; greasy deck; broken leg.

Schedule B.

This is a list of seamen who claim to have a right of action at law against the Fleet Corporation and/or operator with right of trial by jury. This list contains in the order indicated: Names of the plaintiff and defendant; court where suit filed; amount sued for; date of injury.

.....

Alexander Lovette, Jr., as adm. of Estate of Benjamin Lovette, Jr., deceased, *v.* Fleet Corporation & Lykes Brothers; United States District Court for Southern District of N. Y.; $50,000; July 8, 1927.

Claude Stratton *v.* Fleet Corporation and Shipping Board; Supreme Court for County of New York; $30,000; June 29, 1925.

Joseph P. Duffy *v.* Fleet Corporation; Supreme Court for County of New York; $25,000; November 28, 1924.

Marion Steele *v.* Fleet Corporation & Lykes Brothers; City Court of the City of New York; County of New York; $3,000.; October, 1925.

Eugene McCarthy *v.* Fleet Corporation; Supreme Court for County of Kings; $25,000.; September 30, 1924.

Adolph Sandberg *v.* Fleet Corporation; Supreme Court for County of Queens; $10,000.; March 10, 1925.

Joseph Cater *v.* Fleet Corporation and Consolidated Navigation Company, Inc.; Supreme Court for County of Kings; $30,000.; November 30, 1925.

Edward Goellner *v.* Fleet Corporation and Consolidated Navigation Company, Inc.; City Court of City of New York; County of New York; removed to U. S. District Court; Southern District of New York; $10,000.; October 2, 1925.

Harry Sullivan *v.* Fleet Corporation and Lykes Brothers; City Court of City of New York; $3,000.; July 29, 1926.

Carl Johnson *v.* Fleet Corporation and Consolidated Navigation Company; Supreme Court for County of Kings; $30,000.; July 10, 1925.

John Morris *v.* Fleet Corporation and Kerr SS. Company; Supreme Court for County of Richmond; $10,000.; January 29, 1924.

Hollis Randall *v.* Fleet Corporation and Consolidated Navigation Company; Supreme Court for County of Richmond; $15,000.; December 15, 1924.

Milton Ruble as adm. of Estate of Charles Ruble, deceased, *v.* Fleet Corporation; District Court for Southern District of New York; $50,000.; February 15, 1927.

Bernard Barton *v.* Fleet Corporation and International Freighting Corporation; City Court of City of New York; County of New York; $2,000.; June 15, 1925.

August Jensen *v.* Fleet Corporation and Consolidated Navigation Company; City Court of City of New York; County of New York; $3,000.; July 1, 1925.

Sophie Meier *v.* Fleet Corporation; Municipal Court; Third District; $1,000.; September 26, 1927.

Guerry Pharr *v.* Fleet Corporation and American Republic Line and C. H. Sprague & Son, Inc.; District Court for Southern District of New York; $25,000.; May 18, 1927.

James Jackson *v.* Fleet Corporation and American Republic Line and C. H. Sprague & Son, Inc., City Court of City of New York; County of New York; $10,000.; July 3, 1927.

Eugene Riley *v.* Fleet Corporation and A. H. Bull & Company; City Court of New York, County of New York; $3,000.; April 23, 1927.

Leonard Mallet *v.* Fleet Corporation and Waterman SS. Company; Supreme Court for County of Richmond; $30,000.; January 28, 1927.

Adolphe Rundblom *v.* Fleet Corporation and Mississippi Shipping Company; City Court of City of New York; County of New York; $2,500.; December 20, 1926.

John Saxon *v.* Fleet Corporation; City Court of City of New York; County of New York; $3,000.; March 2, 1927.

Thomas McIntyre *v.* Fleet Corporation; City Court of City of New York; County of New York; $3,000.; January 7, 1927.

Elmer W. Lindsay *v.* Fleet Corporation and Waterman SS. Company; City Court of City of New York; County of New York; $10,000.; July 13, 1926.

Michael Bergsin *v.* Fleet Corporation and W. A. Blake & Company; Supreme Court for County of Richmond; $35,000.; June 20, 1924.

Lawrence Ashcroft *v.* Fleet Corporation and International Freighting Corporation; City Court of City of New York; County of New York; $3,000; April 30, 1925.

Wilbur H. Meyer *v.* Fleet Corporation and Lykes Brothers; District Court for Southern District of New York; $45,000.; October 15, 1925.

William Faise *v.* Fleet Corporation and S. I. Ship Building, Inc.; City Court of City of New York; County of New York; $3,000.; February 1927.

Edward Brady *v.* Fleet Corporation and International Freighting Corporation; District Court for Southern District of New York; $30,000.; March 22, 1927.

Edward Russel *v.* Texas Transport & Terminal Company; District Court for Southern District of New York; $50,000.; November 29, 1926.

K. F. Altio as adm. of Estate of Ardio Kusisto *v.* Fleet Corporation; District Court for Southern District of New York; $35,000.; April 13, 1927.

Richard Harvey *v.* Admiral Oriental Line; Superior Court State of Washington, Kings County, No. 21807; $35,000; January 1927.

Ernest E. Smith *v.* Shipping Board Fleet Corporation; Supreme Court of Pennsylvania No. 14168, 1928 September Sessions; $50,000.; February 1927.

Isaac T. Gray *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $20,000.; December 23, 1926.

Joseph Paul *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $40,000.; February 4, 1926.

Edwin R. Roberts *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $10,000.; December 29, 1925.

John T. Taylor *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $10,063.; July 24, 1927.

Gilbert H. Hunter *v.* Fleet Corporation and operator; Supreme Court of Kings County; $50,000.; December 16, 1925.

Robinette D. Johnson as administratrix of the Estate of William Johnson, deceased, *v.* Fleet Corporation and C. H. Sprague; United States District Court for Southern District of New York; $65,000.; May 2, 1927.

Arnold Hansen *v.* Fleet Corporation and A. H. Bull; United States District Court for Southern District of New York; $115,000.; March 1, 1927.

John Palanis *v.* Fleet Corporation; Supreme Court for County of New York; $50,000.; December 23, 1925.

John Kitson *v.* Fleet Corporation and J. H. Winchester & Co.; Supreme Court for County of Kings;

John Beaudia *v.* Fleet Corporation and J. H. Winchester & Co.; Supreme Court for County of Richmond; $5,000.; January 15, 1926.

Gustav Bjorklund *v.* Fleet Corporation and Kerr Steamship Line; Supreme Court for County of Kings; $50,000.; March 30, 1926.

Robert L. Parker *v.* Fleet Corporation and Tampa Interocean SS. Co.; Supreme Court for County of Kings; $25,000.; June 27, 1927.

Albert Rozmus *v.* Fleet Corporation and Atlantic Gulf & Oriental Steamship Company; Supreme Court for County of Kings; $2i,000.; December 17, 1925.

Buena Ventura Beroin *v.* Fleet Corporation and A. H. Bull SS. Company; Supreme Court for County of Kings; $10,000.; July 27, 1927.

John Servas *v.* Fleet Corporation and Mississippi Shipping Company; Supreme Court for County of Kings; $30,000.; August 8, 1927.

Herbert Hartman *v.* Fleet Corporation & J. H. Winchester & Co.; Supreme Court County of Kings; $5,000.; December 4, 1925.

Concerning the Points Which the Court Has Overlooked or Misapprehended.

Congress did not intend that the remedy granted by the Suits in Admiralty Act should be exclusive of actions at law by seamen against the Fleet Corporation.

We respectfully call to the court's attention the fact that the decision rendered herein has been arrived at through the application of rules of construction and by superimposing one judicial construction upon another. Certain intentions have been imputed to Congress based upon such rules of construction, which we submit are at variance with its actual intent. We submit that the court has permitted logic and reason to obscure the facts concerning the actual intention of Congress in passing the Suits in Admiralty Act and the Jones Act.

Through the application of rules of construction and logic, in *Fleet Corporation* v. *Rosenberg* (1928), 276 U. S. 202, the court imputed to Congress an intent to make the remedy afforded in the Suits in Admiralty Act exclusive of all other remedies in admiralty. In that case, however, the court was not required to, and did not, pass upon the question as to whether suits at law might still be maintained against the Fleet Corporation. In the instant case the court has built upon the intention so imputed to Congress, in the *Rosenberg* case, and has now imputed to Congress not only a further intention concerning the Suits in Admiralty Act, which is not clearly expressed therein, but also an intent concerning the Jones Act, which is contrary to the express provisions thereof.

Furthermore, the intent attributed to Congress in the passage of the Jones Act is based merely upon a presumption that the intent of Congress, when it passed the Suits in Admiralty Act on March 9, 1920, was projected three months into the future and persisted at the time of the passage of the Jones Act on June 5, 1920.

We submit that the history of the facts surrounding the passage of both of these Acts, is a more reliable basis upon which to determine the intent of Congress, than the application of rules of construction no matter how logical, and would further suggest that rules of construction should be resorted to only when it is impossible from an examination of the surrounding facts to determine the actual intent.

In Section 33 of the Jones Act (U. S. Code, Title 46, Section 688), which as above stated was passed three months after the Suits in Admiralty Act, Congress provided as follows:

> "*Recovery for Injury to or Death of Seaman.* Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.)"

We shall later discuss the intent of Congress in passing the Suits in Admiralty Act. Without regard, however, to what may have been the intent of Congress in March, 1920, when it passed that Act, its clearly expressed intent on June 5, 1920, in passing the Jones Act, should not be circumscribed or defeated merely by a presumption that a former intention persisted.

Section 33 of the Jones Act, above quoted, by its express terms applies to "any seaman who shall suffer personal

injury in the course of his employment". No exception is made of seamen employed on ships operated or managed by the Fleet Corporation.

We have examined the debates in Congress upon the bill which became the Jones Act and find no word to indicate that it was thought by anyone that this Act should not relate to all seamen employed in American shipping. Had there been any intent that it should not apply to seamen employed on vessels of the government merchant fleet, such intent must surely have found expression in the act.

The following excerpt from the Eighth Annual Report of the Secretary of Commerce under date of October 30, 1920 sets forth the shipping under the control of the Fleet Corporation and that which was privately owned. In that report it was stated (page 171):

> "The recent growth of the Government's ownership of these ships of 1,000 gross tons is shown by the following statement of the number and tonnage of such ships registered or enrolled in the name of the United States, represented by the Shipping Board and of those of commercial companies and individuals on January 1, 1919 (soon after the armistice of November 1918), on July 1, 1919, the beginning, and July 1, 1920, the close of the fiscal year just ended, and on October 1, 1920:

	Shipping Board		Private Shipowners		Total	
	Number	Gross tons	Number	Gross tons	Number	Gross tons
Jan. 1, 1919..	608	2,305,015	1,055	3,351,841	1,663	5,656,856
July 1, 1919..	982	3,827,203	1,076	3,472,819	2,058	7,300,022
July 1, 1920..	1,630	6,903,128	1,209	3,942,974	2,839	10,846,102
Oct. 1, 1920..	1,698	7,288,208	1,266	4,194,709	2,964	11,482,917"

It thus appears, that, on July 1, 1919, ships of the United States Merchant Fleet, exclusive of those of less than 1,000 gross tons, were of the aggregate gross tonnage of 3,827,203, as compared with similar ships of United States registry privately owner of 3,472,819 gross tons, and that by July 1, 1920 the aggregate gross tonnage of the government merchant fleet had risen to 6,903,128, as compared with those privately owned of 3,942,974 gross tons.

We submit that the argument of the Government that Congress intended Section 33 of the Jones Act to apply to only forty per cent. of American Shipping, is without foundation in fact.

Nor can it be contended that Congress was not aware of the fact that sixty per cent. of all American shipping was under the control of the Fleet Corporation when it passed the Jones Act. The expense of these ships had run to more than $3,800,000,000. (see annual reports of the Secretary of the Treasury, 1920-1929). The operation and disposition of this vast amount of government owned shipping was one of the pressing problems with which Congress was confronted and which it was endeavoring to solve at the time the Jones Act was passed. That Act was largely concerned with provisions restating the character and duties of the Fleet Corporation, (see particularly Sections 1, 5, 7, 12, 14) and Section 18 of that Act specifically provided with respect of the vessels under the control of the Fleet Corporation,

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

The intent of Congress in enacting Section 33 of the Jones Act is clear. Its purpose was to better protect seamen. Congress thereby granted to them a right which they did not formerly possess, *i. e.,* the right to recover damages for injuries resulting in death. It also abolished with respect of seamen the fellow-servant rule which, in these modern times, has repeatedly been declared to be unjust and antiquated, and gave further assurance to seamen of the right to a trial by jury in actions to recover damages for injuries suffered.

In the absence of a clear expression of an intent to exclude seamen engaged in sixty per cent. of American shipping from the benefits of this Act, such an intention cannot

be imputed, without also imputing a failure on the part of Congress to accomplish its purpose. To impute such an intention is not to construe but to destroy.

Nor can we ignore the position of the Government after this act was passed. As heretofore stated, the Fleet Corporation paid judgments recovered against it in actions at law for injuries suffered by seamen, without attempting to have those judgments reviewed by this Court upon this ground. Is it possible to believe that the Fleet Corporation was oblivious of such an intent of Congress if there was any such intention? The failure of the Government to actively urge a defense based upon this ground, for several years after the Jones Act was passed, is significant of the fact that counsel were aware that Congress had no such intent. The reason the defense is now urged is because of the remarks of this court in the *Rosenberg* case.

The position of the Government concerning the effect of the Jones Act was clearly stated in *United States* v. *C. A. Lindgren, Admr.*, No. 25, October Term, 1929, argued on October 8, 1929. There, the Fleet Corporation argued in this court, as its main defense, that Section 33 of the Jones Act did apply to seamen employed on Fleet Corporation ships, and afforded an exclusive right to recover damages for the wrongful death of a seamen occurring on such a ship. The Circuit Court of Appeals accepted the argument of the Fleet Corporation and reversed the judgment of the lower court; *United States* v. *C. A. Lindgren as Admr.*, 28 F. (2d) 725 (1928). The Fleet Corporation argument in that case cannot be reconciled with its position in the instant causes that that section does not apply to seamen employed on ships of the merchant fleet.

We turn now to a brief history of the Suits in Admiralty Act. That Act provided in Section 2 (U. S. Code, Title 46, Section 742):

> "*Libel in Personam.* In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, *a libel in*

> *personam may be brought* against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation."

There was no exclusive language in that Act other than in Section 1, which provided that,

> "No vessel * * * shall, in view of the provisions herein made for libel *in personam*, be subject to arrest or seizure."

None of the authoritative reports of the Congressional Committees, in charge of the Suits in Admiralty Act legislation, give any suggestion of the purpose to exclude seamen from their actions at law against the Fleet Corporation. The sole purpose expressed by these committees was to save the Government needless expense which was daily occurring in bonding ships which had been seized by process *in rem*.

Thus the Committee on Commerce of the Senate stated in its report, (No. 223, 66th Congress, 1st Session) submitted September 12, 1919:

> "The result of this is to subject the United States to unnecessary expense and its vessels to great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels. The principal object of suits *in rem* is to insure the collection of the claim by subjecting the vessel to it. It is not necessary in the case of the United States, which is absolutely responsible, and under the bill ample provision is made for prompt payment of any claim found to be due."

Senator Jones, who was Chairman of the Committee on Commerce, explained this situation further upon the floor of the Senate (Congressional Record, Vol. 58, Part VII, 66th Congress, First Session, p. 7138):

> "I want to say that the Attorney General's office called me up day before yesterday, I think, and stated that there was a ship down in New Orleans that had

been libeled and the court there refused to allow it to go. They have no way in which they can furnish bond unless they go out and arrange it in a roundabout way, as an accommodation for the Government on the part of somebody to furnish a bond so that this ship may go into commerce. That condition of things ought not to exist, of course, and we are trying to avoid it in the future."

Senator Jones was here not giving his own private views upon the purpose of this Act, but was speaking for the Committee, urging the Senate as a whole, to act upon the bill.

We submit that these statements from the reports of Congressional Committees present a more accurate basis for determining the actual intent of Congress, in the passage of these sections of the Suits in Admiralty Act, than the application of rules of construction and logic.

The history of the judicial construction of this Act is also enlightening. In *Wright* v. *Fleet Corporation,* 285 Fed. 647 (1922), the contention that the Act provided an exclusive remedy was overruled. In *Blamberg* v. *United States,* 260 U. S. 452 (1923), and in *Shewan & Son* v. *United States,* 266 U. S. 108 (1924), this court declared that the main purpose of the Act was the substitution of an admiralty remedy *in personam* against the United States for a previously existing admiralty proceeding *in rem* against merchant vessels of the United States.

In *Wallace* v. *Fleet Corporation,* 5 F. (2d) 234, 236 (1925), Judge Neterrer of the Federal District Court for the Western District of Washington, who has written many admiralty opinions, overruled a defense that the Suits of Admiralty Act was exclusive of the remedy afforded by the Tucker Act.

In *Fleet Corporation* v. *Texas Star Flour Mills,* 12 F. (2d) 9, 12 (1926), an action at law, the Circuit Court of Appeals for the Fifth Circuit held that the provision as to interest under Section 3 of the Suits in Admiralty Act was not exclusive, but only applied to cases brought in admiralty under that act. (Citing *Wright* v. *Fleet Corporation, supra.*)

Eastern Transportation Co. v. *United States,* 272 U. S. 675 (1926), held that while the main purpose of the act was to exempt from seizure and arrest merchant vessels of the United States, it "also had a wider effect and created a broader obligation of the United States, as the owner of an offending vessel, like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem.*" (*Fleet Corporation* v. *Rosenberg,* 276 U. S. 202, 212).

It was not until February, 1928, when this court decided the case of *Fleet Corporation* v. *Rosenberg* (*supra*), that it was held that the Suits in Admiralty Act to any extent provided an exclusive remedy. The court then held "that it was intended to furnish the exclusive remedy in admiralty against the United States and the corporation on all maritime causes of action arising out of the possession or operation of merchant vessels", but was careful to state:

> "Whether in addition to furnish an exclusive remedy in admiralty, the Act also prevents a resort to any concurrent remedies against the United States or corporations on like causes of actions in the court of claims or the courts of law, is a question not presented by these cases and upon which, although referred to in the argument, we express no opinion."

We submit that the court should not further extend the doctrine of that case by imputing to Congress an intention by the Suits in Admiralty Act to exclude suits at law against the Fleet Corporation.

An examination of the decision of the court in that case discloses that it was based upon four grounds, *i. e.,* (1) a complete system of administration; (2) uniformity; (3) payment of judgments from the United States Treasury; and (4) repealer clause in Section 13 of the Suits in Admiralty Act. We submit that none of the grounds there stated lead to the conclusion that Congress intended to prohibit actions at law against the Fleet Corporation.

As to the first ground: It is obvious that there is a complete

system of administration with respect of suits in admiralty, but in other respects it is not complete; that is to say, it is not complete as to all claims affecting the Fleet Corporation. In no part of the act does it refer to land torts, nor to actions for breaches of other than maritime contracts. Actions may still be maintained at law against the Fleet Corporation, for such land torts and breaches of such contracts. The test was, "where a proceeding in admiralty may be brought," not, whether in addition, an action at common law for a maritime cause of action may be brought. No attempt having been made by Congress to provide a remedy for such claims against the Fleet Corporation, there is no reason to suppose that it intended by providing the system of administration with respect of proceedings of suits in admiralty, to exclude actions at law by seamen.

As to the second ground: The use of the word "uniformity" on page 213 of the *Rosenberg* opinion, was not made in the usual sense of that term in maritime law. This term as ordinarily used means that the maritime law in its substantive features shall not have divergent rules. This has been many times established. See *Chelentis* v. *Luckenbach,* 247 U. S. 372 (1917); *Panama Railroad* v. *Johnson,* 264 U. S. 375, 388 (1923).

To secure uniformity in the maritime law, it is not necessary to exclude the common law actions of these seamen. The final pronouncement of any question of substantive maritime law which would arise, no matter in what tribunal the action should be brought, would be made by this court and this court would therefore not be troubled by the spectre of lack of uniformity. This defense was made by the Fleet Corporation as long ago as 1921 in the case of *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549, at page 568, and was peremptorily dismissed by Mr. Justice Holmes, who stated:

> "It is suggested that there will be lack of uniformity if suits can be brought in State Courts. This consideration cannot control our conclusion from the statutes. But is is not very serious since such suits against this

> Corporation can be removed to the Courts of the United States, *Pacific Railroad Removal Cases,* 115 U. S. 1, and afterwards are subject to review here. *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246, 258. *Southern Pacific Co.* v. *Stewart,* 246 U. S. 359; *ibid.* 562."

As to the third ground: This presents the question as to whether the payment of judgments out of money in the Treasury demands the exclusive construction. This argument proceeds on the ground that the United States is the real party in interest, an argument which is bolstered by the citation in the *Johnson* case of the case of *Minnesota* v. *Hitchcock,* 185 U. S. 373, 385 (1901). In other words, that the suit although not against the United States, is against the property of the United States.

The answer to this defense is that that is simply not the fact in these cases. These defendants sue only the Fleet Corporation and ask only for a judgment *in personam* against it.

In *Minnesota* v. *Hitchcock,* (*supra*) the proceeding was directed against the property of the United States. It was a suit in equity to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any land in an Indian Reservation.

This court long ago pointed out there is a wide distinction between the Fleet Corporation and the United States. As Mr. Justice Holmes stated in *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 567 (1922):

> "The plaintiffs are not suing the United States but the Fleet Corporation."

The fact that all judgments recovered in admiralty suits were to be reported to Congress is explained by the provisions of the act providing for the payment of the judgments so recovered out of the Treasury of the United States without further act of Congress. Congress simply wished to require that it be advised of such payments which otherwise would not necessarily be brought to its attention. No provision was made for the payment of other judgments. These must, therefore, be brought to the attention of Congress so that appropriations may be made for their payment.

As to the fourth ground: While section 13 of the Suits in Admiralty Act repealed "the provisions of all other acts" inconsistent with the act in question that presents no obstacle to the maintenance of these suits, which are not based upon any prior acts which may have been repealed, but upon a right recognized at common law. It is true that we are also relying on the provisions of the Jones Act, but as this was passed subsequently to the Suits in Admiralty Act, no repealer clause in that act can affect it.

Whatever may be thought concerning the effect of the *Rosenberg* case, it is clear that there the court only construed the Suits in Admiralty Act. The provisions of the Jones Act were not there discussed and were not even called to the attention of the court. The question with which the court is now primarily concerned is not the construction of the Suits in Admiralty Act, but the construction of the Jones Act passed three months later.

In considering the appropriate construction of the Suits in Admiralty Act, attention is directed to the remarks of Mr. Justice Van Devanter considering Section 33 of the Jones Act, the language of which is permissive, as is also that of Section 2 of the Suits in Admiralty Act. In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390 (1923) he stated:

> "It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissable. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury,' the import of which is that the injured seaman is permitted, but not required, to proceed on the common-law side of the court with a trial by jury as an incident."

While we urge the view that in providing a remedy *in personam* in actions in the Suits in Admiralty Act, Congress did not thereby intend to exclude or forbid actions at law by seamen to recover damages suffered by them, nevertheless the determination of the instant causes must in final analysis turn upon the construction of the Jones Act. To construe the Suits in Admiralty Act as excluding these actions at law, the court must read into that act words which are not there found, and such construction can only be justified by imputing an intention to Congress which is in no way supported by the reports of the committees thereof relating to this act, or justified by the circumstances at the time that act was passed and which called forth the portions of that act here in question. We submit that in no event should such an imputed intention be deemed to be perpetuated three months beyond the date of the passage of that act for the purpose of defeating the clearly expressed purpose of Congress in extending benefits to seamen provided for in Section 33 of the Jones Act.

This court has recognized that seamen are wards of the courts. Are they any less so because they are employed on vessels operated by the Fleet Corporation? If so, how may this court justify a construction of Section 33 of the Jones Act which would deprive seamen who were employed on sixty per cent of American shipping from the benefits conferred on all seamen by that statute?

Concerning the Constitutionality of the Suits in Admiralty Act if it be Construed as Excluding the Right of Seamen to Maintain an Action at Law Against the Fleet Corporation.

We submit that such a construction of the Suits in Admiralty Act would render it unconstitutional on the following grounds: The claims sued upon by Johnson and Lustgarten were cognizable at common law. Their rights are not dependent upon statute. While in our view common law actions by seamen were specifically authorized by the Jones Act, if that Act be construed as inapplicable to them because of their employment on vessels operated by the Fleet Corporation, they could still pursue the rights accruing to them under the common law. To what conclusions does this lead?

First, that any statute attempting to place the Fleet Corporation, while engaged in a business for profit in a special class, and to exempt it from suits to which other corporations would be liable, would be discriminatory and violative of the *Fifth Amendment.* It would, in effect, give the right to the Fleet Corporation to deprive citizens of their property without due process of law.

It is unnecessary to consider how far Congress may grant immunities to a corporation created by it to carry on purely governmental functions; that question is not here involved, as there is here clearly presented the situation of a corporation dealing in a proprietary capacity and operating for a profit. The distinctions between the acts of public or quasi public corporations, in carrying on proprietary as distinguished from governmental functions, has long been recognized and cannot be disregarded without creating a precedent having far-reaching and probably ominous results.

That the Fleet Corporation was engaged in a business of a private or proprietary character was definitely established by this court in *Sloan Shipyards* v. *Fleet Corporation,*

258 U. S. 529 (1922), and Congress has no power to confer governmental immunity on such a corporation operating and recognized by Congress to be operating a proprietary business for pecuniary profit.

Second, if this statute be construed as depriving seamen of the right to maintain an action at law for injuries suffered, it is also violative of the *Seventh Amendment* guaranteeing the right to trial by jury.

The right to maintain an action at law and to a jury trial thereof was guaranteed by the *Seventh Amendment* of the Constitution. The common law remedy of enforcing a claim for injuries such as those in question, was in existence before the passage of the Judiciary Act (*Story's Commentaries on the Constitution,* 4th Ed. Sec. 1672, Note 4; *The Hamilton,* 207 U. S. 398, 404 [1907]) and the Seventh Amendment was proposed for adoption by Congress at the same time that the Judiciary Act was passed.

In saving the common law remedy in 1789, Congress saved it because it could not and deemed it could not have taken it away. The first Congress in the Judiciary Act of 1789, in dealing with all cases of admiralty jurisdiction, saved to suitors in all cases the right of a common law remedy where the common law was competent to give it. (1 Stat. 76, 77; *United States Code,* Title 28, Sections 41 and 371). It is true that prior to the adoption of the amendment claimants also had the right to sue in admiralty for the damages suffered from maritime torts but the right to sue at law and secure a jury trial thereof was a concurrent right.

By proceeding at common law, these plaintiffs had as part of the remedy the right of trial by jury (*Chelentis* v. *Luckenbach Steamship Co.,* 247 U. S. 372 [1917]; *Philadelphia R. R. Co.* v. *Berg,* 274 Fed. 574 [C. C. A., 3, 1921]; *Bonham* v. *Southern Menhaden Corp.,* 284 Fed. 362 [D. C., S. D. Fla., 1922]).

Congress has no right to declare that a citizen shall be deprived of a common law action and the right of trial by jury which he has concurrently with a remedy *in personam* in admiralty against the Fleet Corporation, by declaring that he must proceed, if at all, only in admiralty and without right

of trial by jury. So construed, Congress would be taking away a right of trial by jury in a field of remedial law over which capacity to so legislate was reserved from it by the *Seventh Amendment,* and the constitutionality of the Suits in Admiralty Act would be placed in grave doubt.

Congress, it is conceded, could take away a remedy in the nature of a right of trial by jury, if Congress had created it. Congress could also create an exclusive remedy in connection with new substantive rights in the admiralty Courts because of the grant of jurisdiction in *Section 2, Article III of the Constitution, Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 386 (1923), but here the right involved has been reserved from the province of Congress by the *Seventh Amendment.*

Congress "saved" the common law remedy in actions for maritime torts, but this was merely "abundant caution" on the part of Congress (Chief Justice Nelson on page 390, *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344 [1848]).

The court should never construe an act of Congress in such a manner as to even create a doubt as to its constitutionality, if another construction is available (*Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 390 [1923]).

Even if the Suits in Admiralty Act should now be construed as providing for an exclusive remedy and it be held that the Jones Act does not apply to seamen employed in connection with ships operated by the Fleet Corporation, the jurisdiction assumed by the courts when these suits were brought should not now be disturbed.

We have heretofore set forth the fact that within a short time after the passage of this Act, the remedy therein provided for was held not to be exclusive and such determination was not overruled or excepted to, until the determination of the *Rosenberg* case by this court in 1928. Under the law as it then stood, numerous suits were instituted and the lower courts took jurisdiction thereof. This being so, the court should direct them when necessary to continue such jurisdiction.

In *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 593 (1921), the court stated as follows:

> "It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit, such as we have here, would not now be entertained. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *United States* v. *Babcock*, 250 U. S. 328, 331. But the law has become thus settled since this suit was commenced in 1911, and the lower courts, upon the allegations in the bill, properly assumed jurisdiction and disposed of the case. *Busch* v. *Jones*, 184 U. S. 598, 599; *Clark* v. *Wooster*, 119 U. S. 322, 326."

Following the determination of the court in that case, without regard to its opinion concerning the construction of the acts in question, the court should recognize the propriety of the lower and state courts which accepted jurisdiction of claims of the character mentioned prior to the determination of this case.

The direction in the court's opinion herein, as to the disposition of the *Johnson* case does not follow the conclusion of the court set forth in its opinion. Johnson appealed to this court and judgment was granted in favor of the Fleet Corporation for $25. and costs (R. 7). The court directed, however, that the judgment in the *Johnson* case, being Case No. 5, should be reversed.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that upon further consideration, the judgment in the *Lustgarten* case be affirmed and that a new trial be ordered in the *Johnson* case.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioners Johnson and Lustgarten, as *amicus curiæ*, and as counsel for the other petitioners as *amici curiæ*,

C. ALEXANDER CAPRON,
of Counsel,
43 Exchange Place,
New York, N. Y.

(Italics in this brief are our own.)

I, SILAS B. AXTELL, counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing for these causes is presented in good faith and not for delay.

Silas B. Axtell

.....

Counsel for Petitioners.